

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS W. KNOLES

Claimant

VS.

GROENDYKE TRANSPORT, INC.

Respondent

AND

CONTINENTAL CASUALTY COMPANY

Insurance Carrier

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Docket No. 223,341

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on July 20, 1998. The Appeals Board heard oral argument February 16, 1999, in Kansas City, Kansas.

APPEARANCES

Steven D. Treaster of Overland Park, Kansas, appeared on behalf of claimant. Robyn M. Butler of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award. But, in addition to the transcript of the February 17, 1998 Regular Hearing, the Board has also reviewed and considered the depositions of claimant, Douglas W. Knoles, taken February 6, 1998, March 6, 1998, and April 24, 1998. These depositions were not listed in the Award and apparently were not part of the record considered by the ALJ. The parties agreed, however, that these depositions were intended to be part of the record and agreed they should be considered by the Board. Apparently both parties thought the depositions had been submitted to the ALJ as part of the record.

The Board has also adopted the stipulations listed in the Award.

ISSUES

Claimant alleges a series of injuries to his low back through April 8, 1997, his last day of work for respondent. The ALJ denied the claim finding claimant failed to prove that he sustained personal injury by accident as alleged and also failed to prove that he gave timely notice of accidental injury to respondent. Claimant appeals these findings by the ALJ. At oral argument the parties agreed that if the Appeals Board should find the claim compensable, then the Board should decide the remaining issues not reached by the ALJ including the nature and extent of claimant's disability, the amount of temporary total disability compensation due claimant, including what credit should be given respondent for payments it has made, and whether claimant is entitled to an award for future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs, the Appeals Board finds the Award by the ALJ should be affirmed. The Board does so for the reasons stated in the findings and conclusions expressed in the Award by the ALJ. The Board hereby approves those findings and conclusions and adopts same as its own.

Specifically, the Appeals Board agrees with the ALJ that claimant failed to prove accidental injury arising out of and in the course of his employment with respondent. Claimant also failed to prove that he gave his employer timely notice of the alleged accidental injury. In 1993 the Kansas Legislature substantially altered the notice statute, K.S.A. 44-520, by deleting the requirement that before a violation of the notice requirement could operate to bar an otherwise compensable claim, the employer prove it had been prejudiced by a claimant's failure to give notice of the accident within 10 days. Since then, the 1993 amendments to K.S.A. 44-520 have probably served to preclude compensation in more legitimate and illegitimate claims than any other change in the Workers Compensation Act.

In this case, claimant testified that he timely reported injuring his back to three people who served respondent in a supervisory capacity - namely Todd Schram, Michael Alexander, and a third person claimant identified only as the safety manager in Enid, Oklahoma. Mr. Schram, Mr. Alexander and Mr. Ralph Gerdes, who was the safety supervisor in Enid, Oklahoma, from November 1996 through April 1997, all testified that claimant never reported a work-related back injury to them. Although respondent employed other safety supervisors, Mr. Gerdes was the only one for claimant's geographic area during the relevant time period. The Appeals Board finds the testimony of Mr. Gerdes, Mr. Alexander and Mr. Schram to be credible and, taken together, refute claimant's testimony that he gave notice within 10 days of his accidents.

At oral argument, claimant alleged that if the Board were to find that claimant did not give notice within 10 days then there was just cause for claimant's failure to do so. And

if just cause were found, then the Application for Hearing that was mailed to respondent within 75 days of April 8, 1997 would satisfy the notice requirement of the statute. The Appeals Board agrees that respondent was given notice of claimant's accident at least by the date it received claimant's Application for Hearing that was filed with the Division on May 29, 1997. This was within 75 days of the April 8, 1997 date claimant last worked for respondent which is also the ending date for the alleged series of accidents. K.S.A. 44-520 provides that the time for giving notice may be extended to 75 days "if the claimant shows that a failure to notify under this section was due to just cause" The record in this case, however, fails to establish just cause for such failure. Claimant has argued throughout the trial of this proceeding that he did in fact give notice of his back injuries during the time he was working for respondent. Claimant never testified that there was any reason why he failed to give notice within 10 days of his accidents. Accordingly, the Appeals Board finds just cause has not been established and, because claimant failed to give notice within 10 days, this claim is barred.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated July 20, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven D. Treaster, Overland Park, KS
Robyn M. Butler, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director